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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

ANIBAL RODRIGUEZ, et al.,)
Plaintiffs,)
VS.) NO. 20-cv-04688 RS
GOOGLE, LLC,)
Defendant.) San Francisco, California
) Thursday, March 4, 2021
)

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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1 Thursday - March 4, 2021

2 2:23 p.m.

3 **P R O C E E D I N G S**

4 **THE COURTROOM DEPUTY:** Case 20-CV 4688, Rodriguez
versus Google. Counsel, please state your appearances.

5 **MR. RAM:** Good afternoon, Your Honor. Michael Ram of
6 Morgan & Morgan for the plaintiffs. May I please introduce my
7 colleagues. Amanda Bonn of Susman Godfrey will address the
8 Federal Wiretap Act, the California Invasion of Privacy Act
9 and consent.

10 And Mark Mao of Boies Schiller Flexner will cover the
11 common law and constitutional claims. And Mr. Mao can also
12 answer any questions about the technology the Court might have.

13 And then lastly, I will address the Computer Data Access
14 and Fraud Act and the unfair competition law.

15 **THE COURT:** Okay. Well, I don't have problems with
16 people splitting up arguments, but I may not give each of you
17 unlimited time to go over each piece of what you have gone
18 over. I have some specific questions and I will just expect
19 you to -- whoever is talking, to answer my questions.

20 Okay. On the defense side?

21 **MR. SANTACANA:** Good afternoon, Your Honor. Eduardo
22 Santacana of Willkie Farr & Gallagher for defendant Google.
23 With me today are my partners Ben Hur and Simona Agnolucci.

24 **THE COURT:** Good afternoon to everyone.

25 All right, so this is our motion to dismiss the first

1 amended complaint. I have read through what you provided to
2 me. And I am familiar with the six claims for relief. And so
3 let me start with the moving party, whoever wants to begin the
4 discussion.

5 **MR. SANTACANA:** Yes, Your Honor.

6 I'd like to start today by clarifying for the Court a
7 dispute in the briefing about the scope of plaintiffs'
8 allegations, and the products and features that Google has that
9 are actually implicated by them.

10 Firebase SDK is a tool that helps app developers create
11 and manage apps. It has a variety of features, a variety of
12 products, and it's optional to use. All of this is publicly
13 documented. And app developers are the ones who choose to use
14 those tools.

15 On the home page for Firebase SDK --

16 (Document displayed)

17 **MR. SANTACANA:** -- which you can see here, I believe,
18 Your Honor, you can see a list of all of the products and
19 features that are encompassed by the software development kit.

20 Now, there is a red box around --

21 **THE COURT:** Let me stop you there, if I can. And
22 this plays through this whole battle. Remember, I'm just
23 reminding everyone, this is a motion to dismiss. And my focus
24 has got to be on the complaint and the averments in the
25 complaint. And anything that is properly judicially

1 noticeable or incorporated within the complaint.

2 And from the briefing, people are going all off on to all
3 sorts of things that are outside of the pleadings. And now,
4 some of the time, the other side doesn't object and, you know,
5 okay, I can consider that. But even with this first
6 demonstrative you're showing me, you're starting to talk about
7 things that are not part of the question that is in front of
8 me.

9 So, I appreciate you want to explain to me the way all of
10 these different aspects of the technology work. But that may
11 be for another day. This is a motion to dismiss. So focus on
12 the averments of the complaint and why they do not present,
13 under 12(b) (6), a claim that can proceed.

14 So I'm not suggesting necessarily that you were already in
15 prohibited territory. But it certainly looked like you were
16 getting there. So keep it in mind.

17 So, go ahead.

18 **MR. SANTACANA:** I will, Your Honor. And I agree with
19 you. And actually, that is the purpose of the slide, which I
20 will note is an identical to a slide the plaintiffs are --
21 intend to show today as well.

22 The point is to say that the averments in this complaint
23 only talk about Google Analytics for Firebase. And in the
24 briefing, the parties have gone back and forth about what to do
25 about the fact that the plaintiffs chose to use the phrase

1 "Firebase SDK scripts" repeatedly to refer to what in
2 Paragraphs 50 through 58 is clearly alleged to be functionality
3 and Google Analytics for Firebase. So --

4 **THE COURT:** Is that right? I'm not saying that
5 they're going to be able to prevail on this, but they are
6 suggesting that there is a secret script in the sense that
7 unbeknownst to the world, effectively, Google for its own
8 purposes is running its own Google Analytics, and that all of
9 the discussion about Firebase and all the rest and your
10 arguments about you know, the agreements, terms of use and all
11 of that is sort of besides the point that -- I mean, I
12 understand that you say you're going to be able to show that
13 this is not true, and that you don't have this shadow, if you
14 will. But that's not something I can deal with on a -- on a
15 dismissal motion.

16 **MR. SANTACANA:** I don't agree, Your Honor. In
17 *Williams versus Facebook*, you did just that.

18 The issue is that the plaintiffs are alleging two things.
19 First, they're alleging that Google Analytics for Firebase has
20 violated their privacy. And then second, in their opposition,
21 they've shifted to the theory that even if that's not violating
22 their privacy, even if it's consented to by all of the parties
23 involved, there's a shadow copy of that program that is running
24 in the background and that is secretly doing the same thing for
25 Google's own benefit.

1 Now, the problem with that allegation is that it's not
2 good enough to pass Rule 8. And certainly not good enough to
3 pass Rule 9(b). And this is why I would like to focus on the
4 allegations of the complaint.

5 Just to give you one example Paragraph 54 talks about the
6 secret transmission. Secretly copying and transmitting two
7 parameters by Firebase SDK scripts. But Paragraph 54 is using
8 quotations from public Google documentation. There are no
9 secrets here, Your Honor.

10 The basis of this complaint, the only factual allegations
11 in the 81 pages, appear in nine paragraphs. The rest is either
12 complaints about unrelated conduct like a consent decree from
13 2011 --

14 **THE COURT:** The simple fact that it's only in nine
15 paragraphs isn't of any particular consequence, if the nine
16 paragraphs are adequate. So what --

17 **MR. SANTACANA:** Each --

18 **THE COURT:** -- is wrong with that section of the
19 complaint?

20 **MR. SANTACANA:** Each of the nine paragraphs, if you
21 start with Paragraph 50 and you move through Paragraph 58,
22 each one is quoting public documentation about Google
23 Analytics for Firebase. There aren't any facts here that
24 allege -- there aren't any facts here that would demonstrate
25 that there is a secret shadow copy out there.

1 What they're discussing in these paragraphs is the
2 publicly documented and consented to product, Google Analytics
3 for Firebase. And these Footnotes 11, 14 through 16, these are
4 all websites about Google Analytics for Firebase.

5 So I think the problem -- and Paragraph 54 exemplifies
6 it -- is that the plaintiffs are saying: There's a secret.
7 How do I know there is a secret? Because I read it on Google's
8 website.

9 That's not a secret, Your Honor. That's just a conclusory
10 allegation. And it just -- it doesn't come close to passing
11 the Rule 8 standard, much less the Rule 9(b) standard. It's no
12 different than the standards set in *Iqbal*, where the plaintiff
13 said: I believe that you have secretly come to an agreement to
14 create policies that will injure me. How do I know that?
15 Because I believe that you've done that. But there is no
16 citation to public information that suggests it. And there's
17 no citation to non-public information that suggests it. And so
18 the Court said: Just because it's possible doesn't mean it's
19 plausible.

20 Nothing in this complaint actually alleges a fact that
21 it -- tends to make it more likely that Google has a secret
22 shadow copy of Google Analytics for fire Firebase.

23 And I would like to take a step back, Your Honor, and
24 point out this entire discussion is only because we filed a
25 motion that demonstrated that Google Analytics is completely

1 consented to, up and down, left and right. There's no question
2 that the plaintiffs consent to that. And that Web & App
3 Activity, that toggle, doesn't come close to addressing whether
4 Google Analytics for Firebase is going to work.

5 I mean, this is a tool so the *New York Times* can see on an
6 aggregated, anonymized basis how popular their articles are.
7 That's alleged in the complaint. That's not me testifying,
8 that's in the complaint. That's what it's for.

9 So the question is: Okay, where in the complaint is there
10 an allegation about a secret that no one else knows? I would
11 point Your Honor to your decision, *Williams versus Facebook*.
12 The issue there, Facebook said, was that it wasn't on adequate
13 notice of what was -- what the complaint was actually reaching.

14 And Your Honor wrote that (As read) :

15 "Adequate notice is essential because it ensures that
16 plaintiffs are deterred from filing complaints as a
17 pretext for the discovery of unknown wrongs."

18 In other words, it isn't enough --

19 **THE COURT:** Here, you know exactly what they're
20 alleging. You know exact- -- I mean, unless they tell me to
21 the contrary, they are alleging that there is this -- secret
22 scripts, in the sense that unbeknownst to the users and
23 anybody else, that Google is, for its own purposes, retrieving
24 this data.

25 So you're on notice -- I mean, the notice point doesn't

1 fly at all, because you know exactly what they're saying. You
2 just say they have no basis for saying it.

3 **MR. SANTACANA:** Well, I don't think that's right. I
4 mean, in *Williams*, the plaintiff had a very similar
5 allegation. But the problem was that the plaintiff didn't
6 include any specific facts about the accused program. Here,
7 sure, I'm on notice of the conclusion that they have alleged.
8 But I can tell you, Your Honor, I have personally pleaded with
9 plaintiffs' counsel for hours on the phone, in discovery,
10 saying: What other than Google Analytics is at issue in this
11 case? Because I read your complaint; it says Google
12 Analytics. So, I'm investigating Google Analytics, I'm going
13 to produce documents about Google Analytics.

14 And they're saying: No. I want documents about
15 everything because I called it a Firebase SDK script.

16 Well, if that's the logic of it, Your Honor, why didn't
17 they just call it a Google script, and ask for every document
18 at Google? The scope of this is not an academic question; it's
19 a practical question. And it's an essential question under the
20 pleading standard.

21 **THE COURT:** Go ahead.

22 **MR. SANTACANA:** The other case I would point
23 Your Honor to is *Smith versus Facebook*, and the Yahoo! mail
24 case. In both of those, the question was: Has the defendant
25 fully disclosed the scope of what is alleged by the

1 plaintiffs?

2 The courts analyzed the complaint, as alleged, only the
3 facts that were alleged about those programs, and compared them
4 to the privacy disclosures. That's what the Court's task
5 should be here.

6 If we were to ignore every factual allegation in the
7 complaint, and only look at what Your Honor is suggesting,
8 which is: Google has a secret script that is stealing my data,
9 that's it. I mean, there's nothing else. That's it. I can't
10 imagine how that would get past the pleading stage under any
11 standard, much less the Rule 9(b) standard, which we believe
12 does have to apply here. Because the allegation is --

13 **THE COURT:** Do you say it applies to every single
14 claim for relief, or just certain of them? Or which one?

15 **MR. SANTACANA:** No, what we're saying is under the
16 *Vess* case, the Ninth Circuit case that Judge Fletcher wrote,
17 it applies to the averments of fraudulent conduct. So it
18 applies across claims, but not to every allegation.

19 That's why we're saying for example, 50 through 58, these
20 allegations about Google Analytics, they're specific, we
21 understand how to defend those, we're on notice of Google
22 Analytics, we get that. We think we have a winning case on
23 that, and we also think that on the -- on the face of the
24 complaint, there's no merit to that claim.

25 For the rest of the allegations that say there's a secret

1 shadow copy, Google is doing this behind the scenes, that have
2 no factual content other than that conclusory assertion, for
3 those allegations, the Court should require the who, what,
4 when, where and why. Just like in any other case, just like
5 Your Honor did in *Williams versus Facebook*.

6 And, and even if the 9(b) standard didn't apply, at a
7 minimum, the "what" would be nice. Because to say that Google,
8 which is a very large organization, is doing something in
9 secret is not enough to put us on notice of what to look for or
10 where to look for it.

11 **THE COURT:** Okay.

12 **MR. SANTACANA:** So I would like to jump back,
13 Your Honor, to the Google Analytics allegations, to the extent
14 Your Honor has questions about them. I think obviously our
15 discussion so far has demonstrated that the plaintiffs don't
16 -- don't really want to focus on the portion of their
17 complaint that deals with Google Analytics. And that's
18 because Google has a judicially-noticeable terms of service,
19 terms of service the plaintiffs relied on in their complaint,
20 with the app developers.

21 And the app developers have agreed to do two things. One,
22 use this service in order to analyze their traffic on their
23 site, on their app. They learn about which articles are
24 popular, and how long people spend on them, and all of those
25 things. And second, they agree to obtain the consent of every

1 single one of their end users for the use of this product.

2 So -- to -- to avoid this exact situation.

3 And there's no dispute the plaintiffs have never --

4 **THE COURT:** So is it your position that the -- the
5 users of the apps are consenting to Google Analytics?

6 **MR. SANTACANA:** Yes, Your Honor. The users are
7 consenting in two ways. First, the users of the apps consent
8 when they agree to the privacy policy of the apps, themselves.
9 And that -- those, we have a few examples of those, because
10 those privacy policies were brought at issue in the complaint,
11 nine of them. The complaint alleges certain things about
12 those apps. And we showed them.

13 And I mean, one great example is the Alibaba one which
14 says --

15 **THE COURT:** I can get to that point. But how do the
16 users who are using the apps have any idea they're consenting
17 to Google Analytics?

18 **MR. SANTACANA:** Sure.

19 So, I mean, when the user uses the Alibaba app and they
20 agree -- when they open that app and they agree to the privacy
21 policy, that privacy policy says (As read) :

22 "Our platform uses Google Analytics, an internet
23 analytics service provided by Google. Google's
24 cookies allow us to analyze use of the platform. The
25 data generated by it is going to be transmitted to

1 Google and stored by Google on servers in the United
2 States."

3 These are the types of the disclosures we're dealing --

4 **THE COURT:** Where is the consent that -- in addition
5 to the use that the app developer is going to make of this
6 information that is being analyzed through Google Analytics,
7 where is the consent that Google can, for its own purposes,
8 retain the data, and use it for any purpose?

9 **MR. SANTACANA:** Well, so, again, I think this is the
10 problem, is that we have two different worlds of allegations.
11 There's -- there's the Google Analytics world. And I think in
12 that world, there's no dispute that Google's contract with the
13 app developers, its privacy policy with the users, makes clear
14 that it is not just copying this data and using it for its own
15 purposes without permission. The terms of service say the
16 data belongs to the app developer, not to Google.

17 There's a limited set of circumstances where if a user has
18 consented in a number of different ways, and the app developer
19 has, too, then --

20 **THE COURT:** I guess I misunderstood. I didn't think
21 you were disputing the notion that Google does retain the --
22 gets the data, and doesn't exclusively use it for the purposes
23 of the developer, but reserves the right to use that
24 information.

25 **MR. SANTACANA:** No, Your Honor. We're very much

1 disputing that.

2 **THE COURT:** All right.

3 **MR. SANTACANA:** Because that allegation is false.

4 The -- the -- again, there's two worlds. There's the world
5 where Google Analytics for Firebase is simply telling the *New*
6 *York Times* how their app is performing. That data belongs to
7 the *New York Times*. Google is a data processor under the GDPR
8 and the CCPA for that data. It is not using it for its own
9 purposes.

10 Now --

11 **THE COURT:** Are you, as Google, taking the same
12 position in this case as you are in Judge Koh's case, of what
13 service that constitutes?

14 Is it the same position?

15 **MR. SANTACANA:** I don't -- I don't believe there's
16 any inconsistency between Google's position in this case and
17 the two cases that Judge Koh is overseeing.

18 **THE COURT:** The *Brown* case? Okay.

19 **MR. SANTACANA:** Yeah. The *Brown* case and the *Calhoun*
20 case. This question of service, you know, now we're talking
21 about the Web & App Activity toggle. And I think the issue
22 there is the plaintiffs are ignoring the vast context of
23 disclosure that's given to them in the privacy policy that
24 Google gives them, and focusing on one word, the word
25 "services" which they see appears in two documents, and giving

1 it the most aggressive reading they can to try to create
2 ambiguity where this is none.

3 (Document displayed)

4 **MR. SANTACANA:** But I would show Your Honor what I
5 think is the most important part of the privacy policy for
6 this case. It is the part plaintiffs have never alleged
7 anything about. It's the part that says: Your Activity on
8 Other Sites and Apps.

9 And as you can see here, it does very clearly disclose
10 that your activity on other sites and apps is going to be
11 analyzed in part by Google Analytics if the app is using Google
12 Analytics. And there's a button that says (As read) :

13 ""Learn more about how Google uses this data when you
14 use our partners' sites or apps."

15 You won't find this anywhere in the complaint. But this
16 links to a page that is in the record, and that forms part of
17 the privacy portal that Google provides to users.

18 (Document displayed)

19 **MR. SANTACANA:** And that page explains that sites and
20 web -- and apps use Google Analytics to learn more about their
21 users. And that depending on certain settings, Google might
22 use it for other purposes. Including if you consent.

23 But here's the most -- I think most important piece in the
24 entire record.

25 (Document displayed)

1 **MR. SANTACANA:** That same web page says:

2 "If you want to change or withdraw your consent, you
3 should visit the site or app in question to do so."

4 Nowhere in the --

5 **THE COURT:** Isn't that the essence of what the
6 plaintiffs are alleging, is that people do that, and they go
7 to the -- you know, to the WhatsApp point -- the Web & App
8 Activity option, and they say "I don't want to share it," and
9 then it nonetheless gets shared?

10 **MR. SANTACANA:** So Web & App Activity is a Google
11 toggle that deals with Google services.

12 (Document displayed)

13 **MR. SANTACANA:** This is saying if you want to change
14 or withdraw your consent, visit the app in question. That is,
15 go to the *New York Times* app and tell them you don't won't
16 them to use Google Analytics for you. Go to the Uber app and
17 tell them you don't want them to use Google Analytics for you.

18 It's saying you cannot control this through Google. This
19 is something between the app developer and Google, and you
20 should go to the app developer to discuss it with them.

21 Now, some apps have little toggles in their apps for this
22 exact type of data, and some don't. They have a privacy policy
23 like Alibaba, that says: We're going to use this; we want to
24 understand how our users are using our app. And so you agree
25 to it, or you don't install it.

1 And, and, and again, to take a step back, Your Honor,
2 publishers of content have been doing this for over a century.
3 Right? Magazines and newspapers want to know how their
4 articles are performing. They want to know how they're being
5 referred to those subscriptions. All websites are doing this.
6 All apps are doing this. Google is simply one vendor among
7 many that provides this service to businesses.

8 And the idea that the Web & App Activity toggle would
9 somehow override the consent that users give to these apps
10 directly, including proactively, because according to the
11 plaintiffs they can turn the toggle off.

12 And then, they say, a reasonable user could read the
13 privacy policy I just read to you from Alibaba and conclude:
14 Well, that doesn't apply to me because I turned off this toggle
15 called "Web & App Activity." Even though nowhere in that
16 description does it explicitly say it is going to turn Google
17 Analytics off.

18 To the contrary, it links the user to the privacy policy
19 which says Google Analytics is going to be used.

20 **THE COURT:** You honestly think that a downstream user
21 that goes to the effort of doing that and says "I want out of
22 this, I don't want this used," thinks it's only limited to the
23 app's use of it and that there's no suggestion or no intention
24 that's expressed there that they want out from under the use
25 of their data by anybody?

1 I mean, really? Is that what you contend?

2 **MR. SANTACANA:** Well, here's the problem, Your Honor.

3 Again, we go back to the two worlds of allegations.

4 In the Google Analytics world, the data's anonymized.

5 Under the *Low versus LinkedIn* case and the *Moreno versus*
6 *San Francisco BART* case which dealt with a BART app, the
7 questions were: Does a user really have an expectation of
8 privacy, if the data that is being sent to the defendant is
9 anonymized and scrubbed?

10 This data is anonymized and scrubbed. Google is not using
11 it for other purposes without consent. When Web & App Activity
12 is turned off, there is no fact in the -- in the complaint, no
13 factual allegation that suggests that it's being used for any
14 purpose other than that in the contract and the disclosures
15 that have been given to the third-party app developers and the
16 users.

17 So to answer your question directly, yes. That is exactly
18 what I'm saying. That these users, these downstream users,
19 don't -- it wouldn't be reasonable for them to expect that the
20 *New York Times* cannot learn, in an aggregate anonymized basis,
21 which articles they're reading. They're never going to be able
22 to look up which article Eduardo Santacana read this morning in
23 the *New York Times*. They just know that 100,000 people read
24 this one, and 200,000 people read that one.

25 And to the extent that that data is ever personalized, it

1 is only done when there's a toggle that -- a consent that's
2 given by the user.

3 **MR. MAO:** Your Honor, if I may -- this is Mr. Mao for
4 the plaintiffs.

5 If I may just point out really quickly Your Honor,
6 Mr. Santacana just stated that when Web & App Activity is
7 turned off, the data --

8 **THE COURT:** You know, it's not helpful for me for you
9 to interrupt the other counsel who is -- it's his time, and
10 he's making your argument. It's very disruptive. I don't --
11 I don't appreciate it. And it's not professional. So, you'll
12 have your opportunity to speak. But don't interrupt him.
13 When he's done, the professional way to approach this is then
14 you'll have your time.

15 I don't know -- you -- you lucked in; you've now disrupted
16 what he was saying. I don't know what you're talking about,
17 frankly, right now. So please exit the screen, and let counsel
18 whose time it is argue the case.

19 Okay?

20 **MR. MAO:** (Nods head)

21 **THE COURT:** Thank you.

22 Go ahead, Mr. Santacana.

23 **MR. SANTACANA:** Your Honor, I -- I think I've
24 addressed this question of anonymized data. What I want to do
25 is bring it back to the allegations of the complaint. Because

1 I agree that the briefing on both sides, it creates an
2 impression that we are beyond the scope of the record. We're
3 not.

4 The complaint relies -- Paragraph 5, right up front, says:
5 I'm basing my case on Google's privacy policy. That's how I
6 know Google did something wrong. And I'm a plaintiff who
7 really cares about privacy. I read everything very carefully.

8 So this case is premised on that document.

9 (Document displayed)

10 **MR. SANTACANA:** But when you look at the document,
11 nowhere in the complaint does it include the one section about
12 the thing plaintiffs care about. What happens when I visit
13 someone else's app?

14 Nor do they mention that there's a whole other web page
15 that it links to --

16 (Documents displayed)

17 **MR. SANTACANA:** -- that talks about Google Analytics.
18 Specifically, Google Analytics. It doesn't use the word
19 "services" in a layperson sense. It's using the term that's
20 at issue in the case. And it is telling the plaintiffs in the
21 most explicit way possible what they can do to turn it off if
22 they want to turn it off.

23 What this case is about is not whether the plaintiffs
24 consented. There's no question that they consented. There's
25 no question the app developers consented. The question is:

1 Does this Web & App Activity button, does it amount to a
2 revocation of that consent?

3 And in this way, I think this case does stand apart a
4 little bit from a lot of the other privacy cases the parties
5 have discussed in the briefing. Because in those cases, the
6 question is: Was there consent in the first place?

7 In this case, the question is: Was the consent undone,
8 both retroactively and proactively? And I would submit,
9 Your Honor, that the language in the Web & App Activity
10 description isn't specific enough to overcome the specific
11 disclosure I just showed you. And the general canon of
12 interpretation would say that the specifics should overcome the
13 general.

14 The fact that Web & App Activity uses the word "services"
15 and has a phrase that, in isolation, plaintiffs could make
16 ambiguous for purposes of lawyer-created argument doesn't mean
17 that in the constellation of privacy disclosures Google has
18 taken the trouble to create, a reasonable user would walk away
19 thinking what plaintiffs say they were thinking.

20 **THE COURT:** You've now spent time on consent, which I
21 understand applies across the board on the claims for relief.
22 But now, can you just walk through your position on the claims
23 for relief? The Wiretap Act, and then the California
24 statutes, as well.

25 **MR. SANTACANA:** Yes, Your Honor. So on the Wiretap

1 Act, I think this case is indistinguishable from the Facebook
2 privacy litigation that Judge Ware decided in 2011. That was
3 a case where Facebook was sending refer headers to advertisers
4 when users clicked on ads. And Judge Ware reasoned, I think
5 correctly, that it was impossible for there to be a Wiretap
6 Act claim because it's a one-party consent statute.

7 And a lot of these privacy cases, plaintiffs try to push
8 that one-party consent statute into the baby wiretap acts that
9 have two consent requirements. This is a one-party-consent
10 statute. There is no question that app developers purposefully
11 integrated Google Analytics for Firebase for the express
12 purpose of collecting information about their users, to
13 understand how the apps are being used.

14 So I just think the Wiretap Act is an easy one for
15 Your Honor to decide, regardless of the larger consent
16 questions.

17 And I know the plaintiffs brought up the crime tort
18 exception. Unless Your Honor has questions about that, I don't
19 think I need to spend a lot of time on it.

20 The *Susman* Ninth Circuit case is as clear as it could be.
21 Unless Google was acting with the intent to engage in a
22 separate and independent crime or tort, that exception doesn't
23 apply. And there is no allegations like that in this case.

24 Moving on to the -- the CIPA claim, Your Honor, again,
25 mutual consent is our primary argument. There is this other

1 issue that was brought up in the briefing about who the agent
2 is, for purposes of this statute. So we wrote in our briefs
3 that in some ways, Google Analytics is like the Dictaphone.

4 It matters for this statute, because the statute is
5 focused on the person who uses the recording device. Google
6 doesn't use this device. App developers do. It's optional;
7 it's free. No one is required to use it.

8 Even if they are required to use Firebase SDK, as the
9 plaintiffs allege, the plaintiffs have also conceded that
10 Google Analytics for Firebase is optional.

11 So the person who is using the quote-unquote recording
12 device is not Google, it's the app developer. And of course,
13 doing it with full consent.

14 I can move on, if you'd like, to the tort claims.

15 **THE COURT:** Move on to the next one, CDAFA.

16 **MR. SANTACANA:** Sure. So the CDAFA claim, the
17 question on this one, apart from mutual consent, is whether
18 Google acted without permission under the statute. And
19 there's a dispute about whether certain -- there's a certain
20 bar for proving what without permission looks like.

21 The issue that I have with the entire argument the
22 plaintiffs are bringing is that even if Google acted without --
23 just for the sake of argument. We don't agree with this. But
24 even if it acted without the permission of the users, it acted
25 with the permission of the app developers. In fact, with their

1 express invitation.

2 And so I think a lot of the doctrinal dispute about the
3 phrase "without permission" and the word "access" in the
4 statute is irrelevant. Google was there, because it was
5 invited. Its code was installed because that's what the
6 developers wanted to do.

7 And once you set aside under Rule 8 or Rule 9(b) the
8 secret scripts allegations, and you focus on the only factual
9 matter in the complaint, then there's no question that Google
10 is acting with permission.

11 **THE COURT:** Is it fair to say -- and I understand
12 your overarching point that you think there's inadequate
13 averments with respect to the -- to use the shorthand, the
14 secret scripts argument.

15 **MR. SANTACANA:** Yeah.

16 **THE COURT:** If I think -- if I determine that there
17 are adequate averments that there is such activity, then these
18 arguments aren't applicable. Correct?

19 These arguments are all going to the assumption that I
20 won't -- that I don't find the secret scripts contentions to be
21 sufficient.

22 Right? Is that right?

23 **MR. SANTACANA:** I think that's right, Your Honor.

24 And I think, if --

25 **THE COURT:** I mean in other words -- let me -- let me

1 rephrase that.

2 If I were to determine that they have made an adequate set
3 of averments to allege -- which I know you vigorously deny --
4 that there is an undisclosed secret scripts activity going on
5 out here, these flaws in the various claims for relief that we
6 are reviewing wouldn't be applicable flaws. They wouldn't be a
7 basis to dismiss.

8 Is that fair?

9 **MR. SANTACANA:** I think that for -- it depends. It's
10 claim by claim, Your Honor.

11 **THE COURT:** Yeah.

12 **MR. SANTACANA:** So, I mean --

13 **THE COURT:** What I guess I'm saying is that in each
14 of these claims, if one were to assume that they have
15 adequately averred the secret script aspect of the complaint,
16 would -- would there be still a basis to dismiss these claims?

17 **MR. SANTACANA:** I mean, I think that part of the
18 problem is that the complaint is very unclear about the app
19 developers' role in this. So there's a paragraph that says
20 the app developers were coerced, but the plaintiffs have
21 dropped that argument from the briefing. And I think for good
22 reason, because there's not really any argument to say that.
23 And so which flavor of secret scripts I think is going to
24 determine how Your Honor would write the order.

25 And it is important to us because again, as I said, the

1 scope of the case is very unclear to Google. Other than Google
2 Analytics, we don't know what to investigate. And, and so the
3 way that such an order would be written would be very important
4 to us. Because we think this case could be eliminated in an
5 expeditious way, if that was the basis of a denial.

6 **THE COURT:** Okay. Go ahead. So we're -- we're still
7 on the -- the acts -- abuse -- computer abuse law. But I
8 don't know if there is anything more you wanted to say on
9 that.

10 **MR. SANTACANA:** The only other piece on that law,
11 Your Honor, is that again, in *Williams*, you applied Rule 9(b)
12 for allegations about CDAFA. And I think that's exactly the
13 right analysis to use here.

14 I don't have anything to add on our -- on our briefing
15 about the UCL. I think it's clear under the case law, and
16 there is a very large number of cases. But the most recent
17 would be the Consumer Privacy User Profile Litigation before
18 Judge Chhabria, that this does not qualify as lost money or
19 property because the plaintiffs didn't lose anything.

20 And so whatever may be said about other claims, Prop 64
21 narrowed the scope of people who can sue under this, and it
22 just doesn't include these plaintiffs.

23 **THE COURT:** How about invasion of privacy and
24 intrusion on seclusion?

25 **MR. SANTACANA:** So I think what's -- the interaction

1 between the tort claims and the statutory claims is an
2 interesting one. The *Smith versus Facebook* case sort of got
3 into that question. And I think a number of cases since it
4 have held that the bar on intrusion upon seclusion is higher.
5 It's significantly higher than just the plain question of
6 whether there was express consent.

7 There needs to be a question about whether the behavior
8 was egregious, and breaches social norms. And we don't think
9 that's been done here.

10 There's also a big problem with the plaintiffs' personal
11 allegations. In the entire complaint, we have very few
12 allegations about the plaintiffs, themselves. Which apps were
13 they using that they believe contained particularly private
14 information. They list every app on their phone. But they
15 don't necessarily say much about what it is that gave rise to a
16 reasonable expectation of privacy, and what it is they believe
17 Google has done to violate it.

18 And as I've said, the factual allegations are that Google
19 has anonymized this data, unless there's consent for it to be
20 personalized.

21 Other than that, Your Honor, I don't have anything to add
22 on that claim.

23 **THE COURT:** Let me ask you just, on a definitional
24 issue, when you refer to a "Google account," people having a
25 Google account, what is that? I mean, I'm not sure I know how

1 that's defined.

2 **MR. SANTACANA:** So a Google account is -- is
3 typically created at Google.com. There are some organizations
4 in schools and public entities that also have Google accounts
5 for their employees. But there's an account creation process
6 at Google.com, and it involves assigning an email address and
7 making certain disclosures. And then after that, that account
8 is active.

9 Those disclosures, of course, include agreeing to a number
10 of different terms of use, and learning about Google's privacy
11 policies.

12 **THE COURT:** But presumably someone who's using the
13 *New York Times* app or one of the other apps that are discussed
14 in the complaint -- and I recognize one of your arguments is
15 all those apps are free apps, and you think that implicates
16 the -- various of the claims, UCL and others. That's not a
17 Google account.

18 Even if the app has used Firebase and developed its app
19 and all the rest, and may have some internal -- you know, the
20 app, itself, may internally connect up to, say, Google Maps or
21 something like that, the user of the app you don't deem to have
22 a Google account.

23 Correct? Is that correct?

24 **MR. SANTACANA:** So if I'm following your question,
25 the user of the app may have a Google account or may not.

1 **THE COURT:** Right.

2 **MR. SANTACANA:** They are not required to have one.

3 **THE COURT:** Right, understood.

4 **MR. SANTACANA:** Yeah. Okay.

5 **THE COURT:** If they do, it's not because they have
6 that app. It's because they have a separate free-standing, if
7 you will, Google account.

8 **MR. SANTACANA:** That's correct. And so that example
9 of Maps being embedded in an app, like the Lyft app, for
10 example, --

11 **THE COURT:** Yep.

12 **MR. SANTACANA:** -- the Web & App Activity log will
13 show activities from that maps, from those maps searches. But
14 it's not showing this anonymized scrubbed data about who's
15 reading -- you know, how many people are reading *New York*
16 *Times*'s articles.

17 So that -- I mean, that also gets to this other problem,
18 which is that the plaintiffs could verify for themselves, if
19 we're talking about pleading standards, this is something they
20 could have verified for themselves what was and wasn't being
21 saved by Web & App Activity. But there's literally no
22 allegations in the complaint about what was in there.

23 There's no allegations about them visiting the log and
24 saying: Oh, when I had it on, I saw Google Analytics data, and
25 then when I turned it off I still saw it. Or: I turned it off

1 and I didn't see it, but for this reason I believe you're still
2 getting it.

3 So I think that's -- that's the problem that we have. But
4 in any case, to answer your question directly, Web & App
5 Activity is a setting that is only available to Google users.

6 Google Analytics for Firebase analyzes all of the traffic
7 on an app on behalf of an app developer, whether that's an
8 Apple user or a Google user or neither.

9 **THE COURT:** Okay. Okay. On the plaintiffs' side, I
10 want -- the first question I want answered -- so I don't care
11 which of you wants to answer it -- is to get to this question
12 of what exactly the gravamen of this complaint is.

13 Is it -- is it about this secret script notion? And if so
14 I want you to point me to where I can look to determine if it's
15 an adequate set of averments. Or is it something different, or
16 is it both?

17 What's -- what's the focus of this complaint?

18 **MS. BONN:** Thank you, Your Honor. My name is Amanda
19 Bonn, and I'll be addressing that argument. I'm going to
20 share my screen briefly to walk through where in the complaint
21 we think we make this very clear.

22 (Document displayed)

23 **MS. BONN:** Number one, if you just look at our
24 complaint, there are 105 references to the Firebase SDK
25 scripts, which are what our complaint is focused on.

1 There are about 16 references to Google Analytics or
2 Google Analytics for Firebase, which is simply one service in a
3 sweep of services.

4 **THE COURT:** Can I stop you?

5 **MS. BONN:** Yes.

6 **THE COURT:** My question was quite simple. This is
7 all nice.

8 But what I want to know is: Is the premise of your
9 complaint that there is a set of secret scripts activity that
10 is going on for Google's benefit that nobody knows about, or
11 not?

12 This is all fine and nice. But just answer that question
13 for me.

14 **MS. BONN:** Yes, Your Honor. The answer to the
15 question is yes.

16 **THE COURT:** Okay.

17 **MS. BONN:** And here's where in the complaint we have
18 specific allegations that talk about it.

19 (Document displayed)

20 **MS. BONN:** So number one, if you look at Paragraphs
21 52 to 55, we explain in detail how the Google Firebase SDK
22 script causes user's device to send dozens of events which
23 describe their interaction with third-party apps, including
24 numerous parameters for each event -- and we give specific
25 examples of what the events are, and what the parameters are

1 that are sent to Google -- even when users have toggled off
2 the Web & App Activity. So that's where the secrecy is really
3 an issue.

4 **THE COURT:** Wait a minute. There's traffic
5 between -- through the Firebase, between Google and the app
6 developers. That's hardly -- that's hardly a revolutionary
7 concept.

8 (Documents displayed)

9 **THE COURT:** So, where are the averments about Google
10 taking this material, unbeknownst to everyone, and using it
11 for its own purposes? Where is that?

12 **MS. BONN:** Yes, Your Honor. So among other things,
13 in Paragraphs 52 through 55, we talk about how Google directs
14 the user's device to send a duplicate copy of this information
15 to Google.

16 And in Paragraph 118, we talk about how Google combines
17 that information with additional information. Number one,
18 device identifiers that are unique to the user's phone. Number
19 two, persistent identifiers, such as what's called the
20 "X-Client Data Header." And number three, geolocation data.

21 And what's important here --

22 **THE COURT:** How do we know that that is anything
23 but the -- the traffic between the -- the app developer and
24 Google, to advise the app developer of the traffic for the app
25 to the app developer's site and all of that?

1 Where is this secret use by Google of this material?

2 **MS. BONN:** In Paragraph 118, Your Honor, we talk
3 specifically about how Google uses that information in order
4 to target users with targeted advertisement.

5 So it's not merely as part of a service that Google is
6 providing to the app, but Google is using that information,
7 itself, to enrich a user profile and target the user with
8 advertising. And they do that, even when the Web & App
9 Activity button is turned off.

10 (Documents displayed)

11 **MS. BONN:** And Your Honor, I think what that kind of
12 brings us to is the core of Google's arguments is about: What
13 does it mean to turn the Web & App Activity button off? Is
14 that enough to override what Google describes as other forms
15 of disclosures they have made about Google Analytics?

16 And so what I'd like to do briefly, if I may, is walk
17 through our allegations in the complaint that specifically show
18 why users understood that if they turned the Web & App Activity
19 button off, it would stop Google from collecting that
20 information.

21 (Documents displayed)

22 **MS. BONN:** So number one --

23 **THE COURT:** But again, this is where it gets
24 completely garbled as to what you're averring.

25 This activity could be vis-à-vis the app developer and

1 what the ultimate user thinks they are doing. And you may be
2 alleging that -- and then, if it's that -- your contention is
3 that the ultimate user thinks through turning off Web & App
4 Activity, that they have stopped the flow and use of the
5 information, and then Google comes back and gives me all sorts
6 of the aspects of the agreements and the privacy policy, and
7 the like. That's one set of issues.

8 The other set of issues is: Is there meat to the bones of
9 the idea that the information is -- not -- not that it's being
10 analyzed by the web developer contrary to the user turning off
11 Web & App Activity, but is it being used for this nefarious --
12 according to you -- undisclosed use by Google?

13 And you -- you keep merging the two things together. And
14 I can't follow which one is which. Because one has a whole
15 different set of possible arguments with respect to the privacy
16 policy and the like. The other, if you are -- if you have
17 adequately alleged it, sort of completely renders the consent
18 issue no longer of concern for you, in a sense. Because, you
19 know, your contention is they're doing something that they're
20 absolutely not entitled to do.

21 But the problem is that there -- I can never tell in this
22 complaint which thing you're -- which thing you're complaining
23 about.

24 **MS. BONN:** And Your Honor, I think our point is it's
25 really both. And let me explain what that means. So number

1 one --

2 **THE COURT:** Well, let me then tell you if it's both,
3 then you've got to redo this complaint. Because I cannot
4 fathom, this complaint, which thing at any one time you're
5 talking about.

6 Are you talking about, you know, turning off Web & App
7 Activity by the ultimate consumer, who you then contend is --
8 you've got a viable claim because they -- they are being
9 defrauded into thinking that their information is not being
10 used. And we're going to get all sorts of defenses from Google
11 about: No, no, that's perfectly appropriate, look at this
12 policy, look at this policy, it's all fine. So that's one set
13 of issues.

14 But it's not the same -- if your contention is that
15 there's secret activity going on, it's very different. And you
16 need to -- you need to set these things apart. Because
17 otherwise, at any one moment in this complaint, I don't know
18 which thing you're talking about, is the bottom line.

19 **MS. BONN:** Understood, Your Honor. And I do think
20 our -- our class definition is specifically limited to users
21 who turned off the Web & App Activity button. So our class
22 definition is limited in that sense. It's not just everybody
23 who --

24 **THE COURT:** Yes, but the consequences of doing that
25 will be very different under the different scenarios,

1 potentially, that you are averring.

2 If the -- the act of turning off and what the ultimate
3 consumer thinks that has accomplished is very different,
4 depending upon which road you're taking. It may be that you
5 have claims under both roads. I'm not saying you don't.

6 But you -- you -- you can't leave it for me to guess which
7 thing you're talking about at any one time because they may
8 have very different analytical scenarios, is my point.

9 **MS. BONN:** Understood, Your Honor. And to sort of
10 address what you've just said, I think our view is we do have
11 claims under both scenarios for this reason.

12 So -- you know, number one, because these users
13 specifically turned off the Web & App Activity --

14 (Document displayed)

15 **MS. BONN:** And this is an image that's copied from
16 our complaint.

17 Users essentially toggle this Web & App Activity button.
18 And what does it say, you know, on their phone as they're doing
19 that is the effect.

20 (Document displayed)

21 **MS. BONN:** What it says is: What's saved as Web &
22 App Activity is info about your browsing on apps that use
23 Google services. And it says: To let Google save this
24 information, Web & App Activity must be on.

25 So these users that are, you know, our class definition

1 are people who made the election, seeing these disclosures, to
2 specifically turn that button off. Denying consent.

3 (Document displayed)

4 **MS. BONN:** And even for users who didn't have an
5 Android device, which is where this screen shows up for other
6 users who wanted to turn off their Web & App Activity, here's
7 what they would see.

8 (Document displayed)

9 **MS. BONN:** So Google's privacy policy tells them:
10 Across our services, you can control what we collect.
11 "Services" means products that are integrated into third-party
12 apps. It tells them how to do that.

13 (Documents displayed)

14 **MS. BONN:** It says: Use the My Activity screen which
15 allows you to control the data.

16 And that brings them to this, --

17 (Document displayed)

18 **MS. BONN:** -- which is, again, copied from our
19 complaint. And likewise, it tells them: We can save info
20 about your browsing on apps that use Google services. But to
21 let Google save this information, Web & App Activity must be
22 on.

23 So our allegation is these users that our class is limited
24 to specifically elected to turn the Web & App Activity button
25 off, and Google is telling these users through uniform

1 disclosures that their browsing activity on apps is not going
2 to be saved, as a consequence of that.

3 (Document displayed)

4 **MS. BONN:** So that's our core allegation. Now,
5 separate and apart from that, I think -- I think, if I
6 understand Your Honor's point, there may be, frankly, a
7 broader and more fundamental violation here, which is that
8 Google just simply doesn't adequately disclose to people that
9 it has this embedded Firebase SDK script, and that that script
10 is going to direct their device to send all kinds of
11 information to Google. Not only to help Google, you know, act
12 as an agent for the app, but rather, for Google to enrich its
13 own user profile data for its own advertising purposes.

14 And that, frankly, is, I think, a broader and even more
15 fundamental problem with Google's argument that there's
16 consent. Because none of the --

17 **THE COURT:** Well, yes. But just the way you've
18 phrased that maybe this is going on. You've got to do more
19 than: Maybe this is going to on. Is that what you're
20 contending or not? And if it is what you're contending,
21 what's your basis for contending it?

22 And while I pushed back, you know, with your counterpart,
23 it is correct that it is not very well spelled out what the
24 basis for your conclusion that this -- this activity may be
25 going on. I mean, you're saying it does, but you're not giving

1 me a whole lot of basis to conclude that you -- you have facts
2 to support it.

3 **MS. BONN:** Yeah. And I think, Your Honor, number
4 one -- and this is part of what I think opposing counsel was
5 saying -- in part, there are disclosures that Google has made
6 in various forms of documentation to app developers that
7 show -- and that's part of what we quote in Paragraph 52 to
8 55 -- exactly the type of data that they're collecting.

9 And Your Honor's question is, you know: Do we have
10 specific additional allegations that we might add to show the
11 second piece, which is Google is using that data for the
12 purpose of targeted advertising? And I think our view is we
13 have had an expert who's analyzed this; we do think that we
14 have specific evidence that that is what they're using the data
15 for.

16 So if Your Honor said: I want to see additional
17 allegations; how do you know they are using this information to
18 enrich their profile and do targeted advertising, I think that
19 that's something that we can add more detail on, if Your Honor
20 thinks that that is something that we need to do. And we
21 absolutely can.

22 So, you know, I think that's -- that's really what it
23 comes down to. We do allege --

24 **THE COURT:** Because some of these averments that
25 you're even pointing to, 52 through 55 and some of the other

1 ones, if you assume for a moment that Google could -- can
2 respond to those by saying: Oh, this is covered by the -- the
3 privacy policy and the degree of consent that users give, then
4 the simple fact of this collection of information may -- may
5 be non-actionable.

6 All you're saying to me in these averments right now is
7 this -- I use the term "traffic" -- this traffic is going on.
8 Not -- you know. And if Google is correct, they'd say: It's
9 perfectly appropriate. We can get this information so that we
10 can assist our app developers in --

11 (Documents displayed)

12 **THE COURT:** You know, giving them understanding of
13 how their sites are being used and the like. So that's why
14 it's important. You know, these averments beg the question,
15 to some extent.

16 **MS. BONN:** Understood, Your Honor. And I think on
17 that issue, to the extent Your Honor thinks there's more
18 detail we could allege on use, completely understood. And I
19 think we can get there.

20 To go to the point Your Honor just made, I think our
21 position is and we think Google's own documents show that even
22 in the various documents that Google attempted to put into the
23 record that are outside the complaint, those documents, too,
24 show that even when they made various disclosures about Google
25 Analytics to users and to apps, they also represented that that

1 could be overridden through the Web & App Activity button,
2 which is what's really at the core of our complaint.

3 (Document displayed)

4 **MS. BONN:** And so for example, Google put into the
5 record as their motion-to-dismiss Exhibit 2-A, the Google
6 Analytics for Firebase Use Policy. And if Your Honor looks at
7 it, there's a section that says:

8 "How App Users can opt-out of the Google Analytics
9 for Firebase features you use, including through
10 applicable device settings..."

11 So again, even this disclosure that Google points to about
12 Analytics says: Hey, but users are allowed to opt out of it.

13 This is the Google Analytics for Firebase terms of
14 service.

15 (Document displayed)

16 **MS. BONN:** And Google points out: Hey, we require
17 the apps to explain to users about what our services are, and
18 that they're consenting to our services.

19 What they do is they say: And you could do that, apps, by
20 pointing to this website of ours, how we use information from
21 the sites and apps that use our services.

22 (Document displayed)

23 **MS. BONN:** Google showed Your Honor a portion of what
24 that site says. But what they didn't show Your Honor is that
25 elsewhere in that same policy, it once again says how you can

1 control the information that's collected by Google on these
2 sites and apps through your "My Activity" screen.

3 It says: My Activity allows you to review and control the
4 data that's created when you use Google Services.

5 What's My Activity?

6 (Document displayed)

7 **MS. BONN:** It's this Web & App Activity button.

8 So even in Google's own documents about their disclosures
9 to the apps, they are telling the apps that users can opt out
10 of the Google Analytics feature connected to Firebase through
11 the Web & App Activity button. And yet, our allegation is
12 Google continues to collect the data, regardless. And I don't
13 think, frankly, they disagree with that.

14 (Document displayed)

15 **MS. BONN:** This is yet another example. Google put
16 this into the record as their Reply Exhibit A. And this is a
17 document about a different feature of Firebase SDK called App
18 Indexing.

19 And in this document, too -- if you look at the little
20 blue box in the upper left that's part of the document, it says
21 (As read) :

22 "By default, action data is uploaded to Google
23 servers with the user's consent. (Learn more about
24 user consent)."

25 And if you click on it again, it takes you to Web & App

1 Activity. So Google is saying: Look, Firebase SDK by default
2 may send us this data, but users can opt out by turning off the
3 Web & App Activity button.

4 (Document displayed)

5 **MS. BONN:** This is another document Google put into
6 the record. It's an article that they published to -- they
7 direct to site and app owners using Google Analytics. They
8 say it's a useful resources.

9 And again, they say that Google privacy policy and
10 principles describes how we treat personal information when you
11 use Google's services.

12 Well once again, the privacy policy says that users can
13 control the data --

14 (Document displayed)

15 **MS. BONN:** -- through My Activity, which is the Web &
16 App Activity button.

17 So, part of our argument, Your Honor, I think is even in
18 Google's own documents and their best-case scenario which is,
19 you know, narrowing the complaint only to Google Analytics for
20 Firebase despite all of the broader allegations about Firebase
21 SDK as a whole, but even living in Google's universe, the very
22 documents that they have put in the record and cited to the
23 Court demonstrate that Google's position is that users can opt
24 out of this with the Web & App Activity switch.

25 And yet, what they're now saying to the Court is:

1 Regardless of what the user does with that switch, you know,
2 we're still collecting the data, and they should have known
3 that. That's really the core of their argument. And that's --
4 and that's, frankly, what we think is unsupported by the very
5 documents that they have put into the record.

6 And I think for that reason, that's why --

7 (Document displayed)

8 **MS. BONN:** -- what we think Google's really doing
9 here in their briefing is trying to sort of twist the
10 complaint into something different. They, number one, want to
11 say it's only about Google Analytics, not Firebase SDK. But,
12 you know --

13 (Document displayed)

14 **MS. BONN:** -- we give just a few examples here. But
15 overwhelming, we talk about Firebase SDK as a whole.
16 Paragraph 6, Paragraph 11. Here's Paragraph 52 that gives
17 specific examples of the kind of information --

18 (Document displayed)

19 **MS. BONN:** -- that Firebase SDK copies and transmits
20 and sends to Google.

21 Paragraph 64. The secret scripts.

22 (Document displayed)

23 **MS. BONN:** And part of why we think Google is so
24 focused on trying to narrow the case to Google Analytics is
25 they like some of these general disclosures that they make

1 about Google Analytics. But what they don't like is the fact
2 that the very same documents describe Google Analytics as a
3 service, and say users can opt out.

4 (Document displayed)

5 **MS. BONN:** So Google, in their reply brief, kind of
6 changed their mind. And they say: Well, Google Analytics
7 isn't an embedded Google service at all. So all those
8 disclosures you like about turning off Web & App Activity
9 affecting our services, it doesn't apply.

10 And that's completely inconsistent with Google's opening
11 brief, their internal documents, and positions they have taken
12 in three other cases that are currently pending before other
13 judges on this Court.

14 So number one, in their privacy policy, it defines
15 "services" to include: Products that are integrated into
16 third-party apps.

17 (Document displayed)

18 **MS. BONN:** And in the Google Analytics for Firebase
19 terms of service which Google put into the record, they
20 specifically say that Firebase SDK is the software development
21 kit which is incorporated in an app.

22 (Document displayed)

23 **MS. BONN:** In Google's opening brief in this case on
24 this very motion, they described Google Analytics for Firebase
25 and Google's Firebase Service. So they said in their opening

1 brief it's a service. In their reply brief, they said it's
2 not a service.

3 (Document displayed)

4 **MS. BONN:** In the *Brown* case before Judge Koh, Google
5 put in one of their briefs that its privacy policies apply to
6 all of the services offered by Google Inc., and services
7 offered on other sites, e.g. Google Analytics.

8 (Document displayed)

9 **MS. BONN:** In the *Calhoun* case also pending before
10 Judge Koh, just two weeks ago, Google said in oral argument
11 the privacy policy expressly describes the type of data
12 collected by Google's third party services, including Google
13 Analytics.

14 (Document displayed)

15 **MS. BONN:** In *McCoy*, which is currently pending
16 before Judge van Keulen, they put in a brief that touted the
17 Web & App Activity button, as controlling what is collected
18 through these third-party apps, and they attached the Web &
19 App Activity disclosure that's at issue in our case.

20 (Document displayed)

21 **MS. BONN:** And then, Google is contradicting its own
22 exhibits in this case. So in their Reply Exhibit A, they
23 specifically point out that this disclosure to apps about app
24 indexing points to the fact that users can override Google's
25 collection of data through Firebase SDK, through the Web & App

1 Activity button.

2 (Document displayed)

3 **MS. BONN:** So frankly, I think our view is that
4 Google is tying itself in knots, making tortured arguments to
5 say number one, the complaint is only Google Analytics.

6 Sometimes Google Analytics is a service, other times it's not.

7 And the fact that they have to engage in such -- what I
8 can only say is tortured readings of documents, and sort of
9 twisting themselves in knots compared to what they've said in
10 other cases, I think demonstrates the fact that consent is far
11 from clear here. In fact, it's quite the opposite.

12 And at the end of the day, I think the fundamental problem
13 with their argument is they're basically saying the Web & App
14 Activity switch is meaningless. What they're saying is that
15 all of these disclosures on Web & App Activity are about what
16 Google stores in someone's Google account. So when you log in
17 to Google.com, what you see.

18 And then here, they say in their motion that these
19 disclosures don't apply to what they call an entirely separate
20 practice. Collection of third-party app data.

21 (Document displayed)

22 **MS. BONN:** And so what they're really saying is when
23 you turn off the Web & App Activity button, all you're really
24 doing is preventing yourself, when you log in, from seeing
25 that this is the data we have about you. But you're not

1 actually doing anything to stop Google from collecting the
2 data, and keeping it, and using it for our own advertising
3 purposes. We're just not going to link it formally with your
4 My Account.

5 But Your Honor, you know, they use the term "anonymized."
6 They said that: Oh, well, this data is anonymized. And that
7 is contrary to our complaint's allegations. We allege that
8 this data is far from anonymized, because they not only collect
9 the app activity, but they collect a unique device identifier.

10 So it identifies not just: Oh, you're using a cellphone,
11 but the specific device that you're using. They collect
12 geolocation data. And then they collect other unique
13 identifiers, including the X-Client Data Header.

14 So for instance -- and this is just a hypothetical. But
15 if I used my iPhone, and used a variety of apps that had this
16 embedded Firebase SDK, Google is collecting data, under our
17 complaint's allegations, about My Activity on those apps, my
18 geolocation data, so the fact that maybe at other times I'm
19 going to Susman Godfrey's Century City office every day at a
20 certain time. And that information is identifiable. And they
21 do use it for targeted advertising. Whether it's linked in
22 your, quote, My Account that you can actually see or not.

23 So that's really, I think, the core of our argument, the
24 core of our consent argument, which is really at the heart of
25 the wiretap and CIPA claims.

1 The other point I wanted to mention briefly on CIPA,
2 because it is a two-party consent statute, so I think it's an
3 even tougher burden for Google to meet. They haven't met it.
4 They do allege a couple of things.

5 They allege, number one, that these aren't confidential
6 communications. And they cite some other cases that, you know,
7 talk about the fact that sometimes when it comes to internet
8 browsing, it's not really confidential.

9 Here, our allegation is that it is, because these users
10 specifically went to the trouble of switching off the Web & App
11 Activity button. They expressed that view that it would be
12 turned off. And Google's own privacy policy and other
13 documents told the users if they did that, Google would not
14 save this data. And yet, they did it anyway.

15 Number two, you know, they do make this argument that just
16 came up about the idea that somehow Google is not the right
17 defendant, they're not the right agent here. But we allege
18 that the script that's sending this data to Google is Firebase
19 SDK. That's a creation of Google's.

20 And as we kind of walked through those documents, even
21 though perhaps Google talks to the fact that in general, this
22 data might be sent to them, what they don't disclose, and in
23 fact they make contrary disclosures, is the idea that that
24 happens even when the Web & App Activity button is off. They
25 don't disclose to apps or users that users actually can't opt

1 out of this. And in fact, they tell the apps and the users
2 precisely the contrary.

3 So unless Your Honor has other questions for me --

4 **THE COURT:** Well, let me ask you. You showed me
5 various documents that Google had -- had included in their
6 briefing. And I take it by pointing me to those and showing
7 me that material -- do you have any problem with my
8 considering it on motions to dismiss?

9 **MS. BONN:** I think our point, Your Honor, is number
10 one, it's probably improper. A lot of it isn't really what's
11 in our complaint. So frankly, I think the --

12 **THE COURT:** Well, that's my question. It may be
13 arguably improper, but you've joined the debate on those, and
14 haven't -- so I need to know --

15 **MS. BONN:** Well, I would never want to be accused of
16 abandoning an argument, Your Honor. So I think our point is
17 number one, it's not proper; it's improper. And what should
18 be the focus is what's in our complaints.

19 But to the extent --

20 **THE COURT:** Just to alert you, I think you have
21 abandoned the argument, by using the materials. I mean, I
22 would have heard the argument that you can't consider this
23 material. But once you embrace it and use it in an
24 affirmative fashion to convince me that it supports your
25 position, you've waived the argument. In my view. So, you

1 can't have it both ways.

2 And, you know, I just want to alert you to the fact that
3 I, right now, even though I think there may have been arguments
4 that -- on both sides -- materials that have been presented to
5 me are not properly considered on this motion, I think nobody
6 has perfected those objections. And so I'm going to consider
7 the materials that were submitted to me. Even though I think
8 you might have -- both sides might have had an argument with
9 respect to the other side's materials. But, you appear to have
10 abandoned it, wittingly or unwittingly.

11 So, okay. Very good. I don't think I need to have
12 further discussion on each claim for relief. It's fully
13 briefed, and I've reviewed the briefs. And we don't need to go
14 through it all again.

15 Let me go back to Mr. Santacana. And as the moving party,
16 you can respond to what Ms. Bonn has reviewed.

17 **MR. SANTACANA:** Sure. Thank you for the opportunity,
18 Your Honor. I would like to start with this issue of secret
19 scripts. So again, as Your Honor noted, we see some merging
20 in the difference between the scripts that are publicly
21 disclosed and the allegation that there may be a secret
22 script, separate and apart.

23 Now, the reason the plaintiffs haven't alleged any facts
24 to support the claim that there are secret scripts is because
25 they don't have any. There would -- if you were to give them

1 leave to amend, they're not going to allege additional facts.
2 There's no evidence that this happens. This case wasn't born
3 from the disclosure of previously-unknown facts. You don't see
4 any of that in this complaint. It's just a bare assertion made
5 by the plaintiffs.

6 Now, I heard --

7 **THE COURT:** Well, Ms. Bonn did suggest that they do
8 have --

9 **MR. SANTACANA:** She did.

10 **THE COURT:** Alluded to expert information. I'm not
11 sure what form it takes. But on the question of whether or
12 not they would have another crack at it, they have indicated
13 that if I were to go down the path of saying that your motion
14 should be granted, they want another crack at it.

15 And at this stage of the game, why shouldn't they get one?

16 **MR. SANTACANA:** Well, they have had two cracks at it,
17 Your Honor. But this is the first time we've heard of this
18 expert information. I don't know if that -- if that was done
19 before or after the complaint was filed. But they filed a
20 complaint; we moved to dismiss. Rather than oppose that
21 motion, which made all the same arguments we're dealing with
22 here, they amended it and doubled its size.

23 And yet, if I could point Your Honor to really the nub of
24 their argument on secret scripts --

25 (Document displayed)

1 **MR. SANTACANA:** -- it is this slide of theirs.

2 They're saying: This is it. If you want to open the
3 complaint and see where I've alleged secret scripts, you look
4 at these paragraphs.

5 Okay. Let's look at those paragraphs, then. That's I
6 think exactly what we should all be doing. Because I think if
7 you read them, you will see --

8 (Document displayed)

9 **MR. SANTACANA:** If you read them closely and parse
10 them, everywhere where they mention -- you know, Ms. Bonn
11 said: "Firebase SDK scripts" is such an important phrase in
12 this case because that means I'm not talking about Google
13 Analytics. And she points to 52 through 55.

14 Paragraph 52 is taken from --

15 **THE COURT:** Actually, actually, I think they're
16 selling themselves short. I think there are more paragraphs
17 in the complaint that do make the allegation.

18 Now, you will characterize them as conclusory, I
19 understand that. But I don't think that slide was presented to
20 me to say those are the only places they do it.

21 You know, for example, Paragraph 64 is a paragraph that --
22 I know your answer to me and you don't even have to say it is
23 that that doesn't add anything; that's conclusory. But it is
24 -- I mean, I don't think it's fair to say those are the only
25 paragraphs in which this concept is -- is averred.

1 **MR. SANTACANA:** Honestly, Your Honor, I would urge
2 you to ask that question of the plaintiffs: List for me the
3 paragraphs where facts are alleged, not just conclusions, that
4 there are secret scripts.

5 Because in our opening motion we said -- and in the motion
6 that we filed on the first complaint, we said: Look. This is
7 it. These two pages right here is basically all you say about
8 the facts. And if you look at the footnotes, every single one
9 is citing public documentation. So obviously this isn't about
10 secrets.

11 They read Google's website, they learned how Google
12 Analytics works. They put it on these two pages. And then
13 they said: It's secret. That's not -- I mean, that's not
14 enough to get past it. So we have to look somewhere else in
15 the complaint.

16 And the only point I'm making is: Where? Where are we
17 supposed to find the facts that say: I learned about this this
18 way, or I read a news report about it, or I did an analysis of
19 it? If they have an expert, let's hear it. We -- we have
20 never heard of them having expert analysis before.

21 And this is part of the problem, Your Honor, that we've
22 had in this case, is that every time they identify a product
23 that is at issue, like Google Analytics, we point out that it's
24 fully consented to and that we've done everything we need to
25 do. So then what do they do, is they say: Well, but it's not

1 that, then. It's secret scripts.

2 They pointed out in one footnote in the complaint, app
3 indexing. Okay? Well, now they're telling you that -- once
4 they learned that app indexing actually is responsive to the
5 Web & App Activity toggle, they're telling you: Oh, well, in
6 that case, that helps my case, because it shows you're
7 misleading people.

8 App indexing is a different product, Your Honor. It's not
9 the same as Google Analytics, and it's not the same as any of
10 the other 16.

11 So if they tell us what they're accusing, then we can have
12 a litigation. What we can't have is for them to jump from one
13 product to the next; every time they name one we show them it's
14 fully consented to. And then they say: Well, then, in that
15 case it's just -- it's a secret. I will tell you that I know
16 it's a secret, but I won't tell you how I know.

17 The other, I think, critical piece of this secret scripts
18 debate is that the plaintiffs haven't really pushed back on the
19 question of Rule 9(b). You didn't hear Ms. Bonn mention that
20 at all. And there isn't a convincing argument to say that you
21 shouldn't apply Rule 9(b).

22 If the allegation is that Google is, behind the scenes,
23 violating all of its contracts, all of its privacy policies,
24 everything that it tells everybody about how this product
25 works, let's get the who, what, when, where and why of what

1 they're alleging. Because --

2 **THE COURT:** Well, let's take invasion of privacy and
3 intrusion on seclusion. Those aren't 9(b) claims for relief,
4 are they?

5 **MR. SANTACANA:** Again, Your Honor, under the *Vess*
6 case, Judge Fletcher distinguished three categories of claims.
7 There's claims that have fraud as an essential element.
8 Obviously, those are subject to 9(b). There's claims where
9 there's a uniform course of fraud that is alleged to be
10 underlying everything. And he said those -- that means the
11 entire complaint is subject to 9(b).

12 We're -- I think that we could make that argument here.
13 But we're just going for the third category, which is: There
14 are specific averments in the complaints that allege fraudulent
15 conduct. And those averments must be subject --

16 **THE COURT:** Is it your position that if they
17 incorporate those averments into, say, an invasion-of-privacy
18 claim, they've now found themselves in 9(b)?

19 I don't know if I think there's legal support for that
20 notion.

21 **MR. SANTACANA:** That is precisely --

22 **THE COURT:** There may be all sorts of averments, some
23 of which may allege some fraudulent conduct. But if the -- if
24 the elements of the claim for relief don't require any showing
25 of fraud, the fact that you may have incorporated some part of

1 your -- of your, you know, factual material may have some
2 reference to fraud in it, doesn't mean you are in a 9(b)
3 world.

4 **MR. SANTACANA:** With respect, Your Honor, I don't
5 think that's correct. And I would encourage the Court to read
6 the *Vess* case, because it discusses this exact issue. The
7 plaintiffs made that exact argument. And Judge Fletcher,
8 writing for the Court, said no.

9 **THE COURT:** Nobody respects Judge Fletcher more than
10 me. But I will go back and look at the decision.

11 But I find it -- I'll tell you, just my reaction is I
12 think if you just have a tort claim and you properly identify
13 it as a tort claim, and within your complaint you're also
14 alleging fraudulent conduct and you incorporate some of those
15 averments in there, you would -- that would effectively mean --
16 if your reading of that case is right, and I'll go back and
17 look at it -- that if you have a fraud claim at all in the
18 case, everything then becomes a 9(b) pleading standard.

19 Because we often have complaints --

20 **MR. SANTACANA:** No.

21 **THE COURT:** -- that have, you know, tort claims -- we
22 have negligence in there with fraud. And you often will
23 incorporate the same set of averments into both the claims.
24 So it cannot be that if there's, you know, some fraud alleged
25 in there, that everything is 9(b). It can't be.

1 **MR. SANTACANA:** Judge, you're absolutely right, and I
2 want to make sure that I'm being as clear as I can be.

3 So in the *Vess* case, the way it's explained is that the
4 Court must disregard the averments of fraud if they are
5 inadequately alleged, and then evaluate the claim based on
6 what's left. So, so, it's not -- you're right. It doesn't
7 convert the entire case into a fraud case. Of course not.

8 What it means is that we must shield our eyes to
9 inadequate conclusory assertions of fraud, and look only to the
10 factual allegations in the complaint, and see if they suffice
11 under Rule 8. Leaving aside these -- so that's -- okay.

12 **THE COURT:** If I'm looking at invasion of privacy and
13 intrusion on seclusion, which is 4 and 5, and -- don't I look
14 at that through, again, a Rule 8 lens? Because I would go
15 back and go through the complaint, and see if there are
16 sufficient plausible, factual -- you know, *Iqbal/Twombly*
17 averments. And, and if there are, then those are viable
18 claims.

19 I mean --

20 **MR. SANTACANA:** It depends on which -- which version
21 -- I mean, really, the problem is we have for every claim, we
22 have two claims. We have the Google Analytics for Firebase
23 claim. On that one, I agree with you. That's a Rule 8
24 standard. They are saying this -- this program is not the way
25 it should be.

1 **THE COURT:** Right.

2 **MR. SANTACANA:** On the secret scripts world, that's a
3 9(b) standard. And so for intrusion upon seclusion, if
4 Your Honor were, for example --

5 **THE COURT:** Okay, I don't think we disagree. I
6 understand your point.

7 **MR. SANTACANA:** Okay. Great. Okay.

8 **THE COURT:** And again, what sort of overarches a lot
9 of this is -- is, at the very least, to get a clearer sense of
10 what is being -- which of these are being alleged.

11 But, you know, to Ms. Bonn's point, she was quite clear in
12 answer to my questions that -- she said: We're going -- we're
13 doing both. We're doing both things.

14 **MR. SANTACANA:** I know they want to do both. That's
15 why the briefing is the way that it is. But one of them is --
16 is completely conclusory, and the other one lacks merit on the
17 documents that they, themselves, submitted to the Court.

18 On the conclusory piece, again, they want to do both.
19 But, that's fine. Then tell us the who, what, when, where and
20 why of it. They haven't done that. And every time you asked
21 her: Show me what the who, what -- show me the allegation, she
22 pointed to an allegation that is footnoted to public
23 documentation. That's not a secret. That's Google Analytics
24 for Firebase.

25 On the question of the merits of the Google Analytics

1 piece, --

2 (Document displayed)

3 **MR. SANTACANA:** -- these green slides, this is the
4 privacy policy that the plaintiffs attached to their
5 complaint. We are not -- we're not relying on a bunch of
6 documents that are far afield of the complaint. The
7 foundation of their claim is the privacy policy. These words
8 are in their complaint.

9 And what they say is: Hey, when you are on other sites and
10 apps, if they use Google Analytics, they're going to be sending
11 us information about you. Click here to learn more about it.

12 Now, they allege that the plaintiffs are -- care a lot
13 about privacy, that they read this privacy policy, and that
14 they read the description of Web & App Activity, which is in no
15 way as specific as this. And then they complain that: Well,
16 the button where it says "Learn more," they complain you
17 shouldn't rely on that document, because I didn't put in it my
18 complaint.

19 But, it's incorporated into this privacy policy. And
20 that's the document --

21 (Documents displayed)

22 **MR. SANTACANA:** You didn't hear one word from
23 Ms. Bonn addressing this. That's the document that says: For
24 Google Analytics, talk to the app in question. That is a
25 specific instruction.

1 Nothing -- none of the general language in the Web & App
2 Activity control that the plaintiffs are relying on should be
3 held to overrule the specific instruction in a document the
4 plaintiffs say they read.

5 (Documents displayed)

6 **MR. SANTACANA:** That, I think, is the biggest problem
7 with their case. And then, the privacy policy discloses
8 Google Analytics, many times.

9 I think Ms. Bonn said, herself, quote: There are
10 disclosures showing the exact information they are collecting.
11 That's true. We disclose it, I think, at least four times.
12 It's here in the privacy policy.

13 (Document displayed)

14 **MR. SANTACANA:** Here, there's a link to that yellow
15 page I was just showing you: How Google uses information from
16 sites or apps that use our services. You can see that on the
17 last page of their complaint.

18 Then you have -- sorry, I'll just skip to more green.

19 (Documents displayed)

20 **MR. SANTACANA:** You have -- well, I guess I don't
21 have that slide. But there are two others that we point out
22 in our briefing that, in the same privacy policy, talk about
23 Google Analytics in particular.

24 Now, Ms. Bonn said: Okay, but you also told me Web & App
25 Activity would help me control this. And she pointed, among

1 other things, --

2 (Documents displayed)

3 **MR. SANTACANA:** -- to this bullet point right here,
4 this second bullet point, which she showed you, by itself.
5 And she said: This is telling me how you can control the
6 information collected by Google is by going to My Activity.

7 She didn't show you the other bullet points on this same,
8 this yellow page that is linked directly from the question:
9 What are you getting from third-party apps about me?

10 The third bullet -- again, specific over the general. The
11 third bullet says: Websites and apps use Google Analytics.
12 This is separate from Web & App Activity. It is not in the
13 same category as Web & App Activity.

14 Also, the first bullet is about ad settings. Do you want
15 us to target ads to you or not? Why don't you click here?
16 That's not discussed in the complaint.

17 So I think this is the problem, is we -- we don't know how
18 to defend the case, because we don't know what's at issue other
19 than the specific disclosures that we've identified, which
20 couldn't be more on point.

21 **THE COURT:** Could you respond to her point or
22 suggestion that in the different cases that are pending in our
23 district, Judge van Keulen, Judge Koh, me, that you are
24 getting squirrely on what Google services constitute? And
25 that if I go back and consult with my colleagues, I'm going to

1 find that there are -- and I alluded to this question, I asked
2 you earlier, are you taking contrary positions.

3 **MR. SANTACANA:** You did.

4 **THE COURT:** So you can assume that I will go back and
5 look. So, why, why is she wrong that -- her contention that
6 you are taking inconsistent positions about what your services
7 are?

8 **MR. SANTACANA:** Yeah. So, so, Your Honor, it's a
9 two-part answer. First, on this question of what our services
10 are. As I said at the beginning, the plaintiffs have taken a
11 phrase from our reply brief, and twisted it into something it
12 was never meant to be.

13 Obviously, Google Analytics for Firebase is a service that
14 is provided to businesses. The purpose of our argument with
15 respect to that word is simply to say that when a user is on
16 the Web & App Activity portal, and they read this phrase about
17 services -- and I'll just bring it back up so we're all looking
18 at the same thing.

19 (Document displayed)

20 **MR. SANTACANA:** They read this phrase about services.
21 That when they read this, the plaintiffs say they think this
22 applies to everything Google does in the world. Including the
23 anonymized and scrubbed data that Google is holding in trust
24 for app developers like the *New York Times*.

25 And we're saying: Well, I suppose if all you do is read

1 the phrase "Google Services," maybe somebody, somewhere, could
2 think that that's fair, subjectively. But a reasonable user
3 under the reasonable-user standard isn't only going to read
4 those two words. They're going to look at the privacy policy.
5 They're going to look at the descriptions that Web & App
6 Activity is given. And they're going to look at what Web & App
7 Activity is actually doing. Because if they had it on, they
8 could see exactly what was being saved. It didn't include
9 Google Analytics for Firebase. And when they turned it off, it
10 still doesn't include Google Analytics for Firebase.

11 And as a matter of fact, Your Honor, and I just want to be
12 very clear about this. When Web & App Activity is turned off,
13 Google does not target ads to users based on data collected via
14 Google Analytics for Firebase. And if Your Honor were to give
15 them an opportunity to amend their complaint, and if they were
16 to allege that specifically, which they haven't, then I think,
17 Your Honor, this case would be over very quickly. Because it
18 would just be factually wrong.

19 But because they've avoided making those types of
20 allegations, and instead, relied on secret scripts, now they
21 are saying: All I have to do is tell you there's a conspiracy.
22 I don't have to tell you anything else about it.

23 And of course, you know, everything else I went through is
24 separate and apart from the consents that are given. Right?
25 Web & App Activity, even if you turn it off, then you go --

1 then you go get the *New York Times* app, and the *New York Times*
2 says: I'm using Google Analytics. You are opting into that by
3 installing this app. If you don't like it, please don't
4 install this app. Because I want to know which articles are
5 popular.

6 I don't think there is any authority cited in the briefing
7 that suggests that a user control could proactively revoke that
8 consent given to an app in the future.

9 Going back to your -- the direct question on
10 inconsistencies, though, there's nothing inconsistent about
11 what Google's counsel is saying in these cases. And I'll just
12 give you one example from their slides that they showed you.

13 And I will say Your Honor, I object strenuously to the
14 excerpts that were made here from other litigation that
15 Your Honor doesn't have a grounding in. And I do encourage you
16 to check it out, yourself. Because what you'll see is far
17 different from what you are seeing on these slides.

18 (Documents displayed)

19 **MR. SANTACANA:** But just as an example --

20 **THE COURT:** You're talking about the reference to the
21 other cases in the district?

22 **MR. SANTACANA:** Yeah. These slides in the 30s and
23 40s.

24 **THE COURT:** Go ahead.

25 **MR. SANTACANA:** For example, here it says -- Ms. Bonn

1 says this contradicts what we've said in this case (As read) :

2 "The privacy policy describes the type of data
3 collected by Google's third party services Ad Manager
4 and Google Analytics."

5 That's exactly what we're saying in this case. It does
6 describe that. It describes it right here.

7 (Documents displayed)

8 **MR. SANTACANA:** It describes it right here. They're
9 looking at the portion of the privacy policy that talks about
10 the services Google provides to users. Maps, search bars,
11 YouTube. Those are user services. This is the part of the
12 privacy policy about third-party apps and sites.

13 So, how come the complaint doesn't talk about this?

14 Why are we focused on the word "services" rather than on
15 the phrase "Google Analytics" which is used, I think, five
16 times in the privacy policy, and then links to another page --

17 (Documents displayed)

18 **MR. SANTACANA:** -- which specifically tells you how
19 to turn it off. That, I think, should be the question that
20 plaintiffs need to answer, and I don't think they've answered
21 that. I don't think they have ever even responded to that
22 sentence I've just showed you that says: This is how you turn
23 it off.

24 Every time you ask that question, instead what you get is:
25 Well, but there are also secret scripts. They are also doing

1 it behind the scenes.

2 Lastly, Your Honor, I do want to say one more thing, and
3 then I'll leave it there. The plaintiffs have this -- this
4 category of argument that says that Google is technologically
5 capable of merging data, and that means the data is not
6 anonymous.

7 The *Low versus LinkedIn* case and the *Moreno versus*
8 *San Francisco BART* case -- there's also the *iPhone Application*
9 litigation case -- they all say the same thing. That that
10 technological capability is not the same thing as actually
11 doing it. And if you don't allege that it was actually done,
12 then you are not in the world of liability.

13 And the reason this is important is because --

14 **THE COURT:** I thought that they were averring that it
15 was actually done. That they were actually taking geographic
16 information and other information, that they -- that you were
17 retrieving that material.

18 **MR. SANTACANA:** So, well, let's look at that
19 allegation. I think, again --

20 **THE COURT:** (Inaudible)

21 **MR. SANTACANA:** Sorry?

22 **THE COURT:** Go ahead.

23 **MR. SANTACANA:** Those -- well, I don't have it ready
24 here. But those allegations are, each one of them,
25 conclusory. And if Your Honor -- if the Court parses each one

1 of them, the paragraphs that they showed you, 118, what you'll
2 see is there's no -- there are no facts alleged there.

3 They're just alleging the conclusion: You -- you did this
4 behind the scenes. But where are the facts that would nudge
5 the possible to the plausible? Of course it's possible.

6 Anything is possible. The question is: Is it plausible?

7 And just because they said it in one paragraph in a
8 complaint or even in a hundred paragraphs in the complaint
9 doesn't make it enough to get past the pleading stage. It's
10 just -- it's not enough.

11 And so once you leave that aside, all they're left with is
12 their secondary argument, which is: Well, it's not
13 meaningfully anonymous, because you could combine it, and so
14 give me a break. One arm of Google knows this, the other arm
15 of Google knows that. That's not anonymous.

16 But what they're saying there is, first, completely at
17 odds with the truth, completely at odds with the terms of
18 service. But also, there's no basis to say under the case law,
19 under *Low* and *Moreno* and *iPhone Application*, that that gives
20 rise to liability. Because if Google is holding this
21 information, anonymized, in trust, for the *New York Times*, and
22 they have no competent allegation to suggest that it is merging
23 that information without permission and unbeknownst to
24 everyone, then if there's no competent allegation of that, then
25 it's simply not enough to say: Well, my scrubbed information

1 is private to me. No, it's not. The law in this district is
2 that it's not.

3 **THE COURT:** Okay, thank you.

4 Ms. Bonn, you can have two minutes, and then we're going
5 to wrap it up.

6 **MS. BONN:** Thank Your Honor.

7 Very briefly, I think in Paragraph 118, we talk about why
8 this isn't scrubbed. It's not anonymous data. It's combined
9 by Google with unique device identifiers, geolocation data, and
10 persistent identifiers.

11 So Google is arguing today: Oh, we scrubbed the data, we
12 put in it a silo, we only use it for the apps. We don't use it
13 for our own targeted advertising purposes. That is totally
14 contrary to the allegations in our complaint, number one.

15 Number two -- and I'll go back to be certain after this
16 hearing, and I can put it in the record. But I believe last
17 week during a similar argument that we had before Judge Koh in
18 the *Brown* case, Google's counsel specifically represented that
19 when there are third-party sites that use Google Analytics,
20 they don't just use the data to help the website analyze their
21 activity. They use it for their own targeted advertising
22 purposes. And that's what triggered Judge Koh into demanding a
23 declaration from Google explaining what they do. So I think
24 they're taking contrary positions on that very issue,
25 simultaneously.

1 And finally, you know, we do cite the privacy policy
2 specifically in our complaint. And, you know, we are not the
3 ones who are making up some fanciful notion that Google
4 Analytics is a service within the meaning of Google's privacy
5 policy and their other disclosures.

6 (Document displayed)

7 **MS. BONN:** This is Google's privacy policy, cited in
8 our complaint that says: Our services includes products that
9 are integrated into third-party apps.

10 Now, Mr. Santacana said: Well, we're only talking about
11 services for users, like search bars. Well, look what it says
12 (As read) :

13 "Products that are integrated into third-party apps
14 and sites like ads..."

15 I respectfully submit, Your Honor, that Google's
16 advertising is not a service offered to users. It is a service
17 offered to those who purchase their advertising products.

18 So Google's own disclosures make clear that "services"
19 doesn't mean "user services." It is any service that is
20 integrated into a third-party app. Google's various documents
21 describe Google Analytics for Firebase and Firebase as a Google
22 service. That's the position Google has taken in numerous
23 cases before this Court.

24 Thank you, Your Honor.

25 **THE COURT:** Thank you. Very helpful.

1 **MR. SANTACANA:** Your Honor, can I just say two very
2 quick things? There's some new argument there.

3 **THE COURT:** All right.

4 **MR. SANTACANA:** So first, with respect to the *Brown*
5 hearing, I just -- what I'd like to say, separate and aside
6 from everything else Ms. Bonn said, the Google Analytics at
7 issue in that case is not Google Analytics for Firebase. That
8 case deals with websites. And so I'm not sure what she
9 believes she heard, and I guess she'll go back and check. But
10 it doesn't have anything to do with mobile apps using Google
11 Analytics for Firebase.

12 Second, on this slide which she still has up, "like ads
13 and embedded Google Maps," this is precisely our point,
14 Your Honor. Ads are things that users interact with. Google
15 Maps are things that users interact with. And in this section
16 of the privacy policy, Google is saying: The things you
17 interact with that are ours that are Google things that we're
18 providing that you're interacting with, we track that stuff.

19 Then at the very end of the policy when you -- if click on
20 the question: Where does my -- What happens to my activity on
21 other sites and apps, if you go to that portion of the policy,
22 that's where the specific disclosure is of how to do -- of how
23 to opt out of this collection of information.

24 And again, I'll point out, the plaintiffs have never
25 responded to that. That is far more specific than this one

1 phrase.

2 **THE COURT:** Okay. Thank you very much. Very helpful
3 argument. I'll go back and review it. And we'll go from
4 there. So, thank you very much.

5 **MS. BONN:** Thank you.

6 **MR. SANTACANA:** Thank Your Honor.

7 **THE COURT:** Bye-bye.

8 (Proceedings concluded)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Monday, March 8, 2021